

International Association of Bridge, Structural and Ornamental Iron Workers, Local 395 and Arco, Inc. and Northwest Indiana District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Party in Interest. Case 13-CD-546

April 15, 1998

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FOX, HURTGEN, AND BRAME

The charge in this Section 10(k) proceeding was filed on October 16, 1997, by the Employer, alleging that the Respondent, International Union of Bridge, Structural and Ornamental Iron Workers, Local 395 (Iron Workers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Northwest Indiana District Council of the United Brotherhood of Carpenters and Joiners of America (Carpenters). The hearing was held on November 10, 1997, before Hearing Officer Diane Ehmich.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

Arco, Inc. (Arco), an Ohio corporation, is engaged in the business of general construction and food service equipment sales and installation, including food refrigeration equipment, from its facility in Toledo, Ohio, where it annually ships goods valued in excess of \$50,000 from its facility located in Toledo, Ohio, to customers located outside the State of Ohio. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Iron Workers and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

On August 8, 1997,¹ Arco notified the Carpenters that Arco's bid to construct Meijer store #165 contemplated the assignment of certain work to employees represented by the Carpenters. The work included the erection and installation of metal bumper posts or goal posts. Thereafter Arco commenced work on the project. On October 15, Arco's crew of three car-

penters and one apprentice commenced setting bumper posts or goal posts. They set one of the bumper posts, including plumbing, leveling, and bracing. In addition, the crew unloaded four or five additional bumper posts from a delivery truck. Thereafter, more than a dozen ironworkers arrived at the jobsite. The steward threatened the Arco foreman with a work stoppage if employees represented by Iron Workers did not perform the bumper post work. As a result, Arco's crew and the delivery truck left the jobsite, the crew failed to unload the rest of the bumper posts or to set more bumper posts, and the ironworkers dismantled the bumper post already erected. On October 16, Arco filed the charge in this case.

B. Work in Dispute

The disputed work involves the erection and installation of metal bumper posts or goal posts at Meijer's store #165 jobsite located at 611 West U.S. Route 30, Merrillville, Indiana.

C. Contentions of the Parties

Arco contends that there is reasonable cause to believe that the Iron Workers violated Section 8(b)(4)(D) of the Act. Arco further contends that the work in dispute should be assigned to employees represented by the Carpenters on the basis of employer preference, industry and area practices; relative skills and safety; and economy and efficiency of operations.

Carpenters contend that the work in dispute should be assigned to employees represented by the Carpenters for the same reasons asserted by Arco.

Iron Workers did not appear at the hearing and stated no position.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute. The Board requires that there be reasonable cause to believe (1) that a labor organization has used proscribed means to enforce its claim to the work in dispute, and (2) that there are competing claims to the disputed work between rival groups of employees.

On October 15, Iron Workers claimed the work in dispute and threatened a work stoppage if Arco failed to allow employees represented by Iron Workers to perform the disputed work. Furthermore, on that date, Iron Workers caused a work stoppage in their attempt to enforce their claim to the disputed work. All disputed work ceased and iron workers dismantled the disputed work already performed by Arco's crew. In these circumstances, we find reasonable cause to be-

¹ All dates are in 1997 unless otherwise indicated.

lieve that a violation of Section 8(b)(4)(D) has occurred.

Having found that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and, as we find no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act,² we conclude that the dispute is properly before the Board for determination.³

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Local 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

Arco and Carpenters stipulated that there is no Board order or certification determining the bargaining representative of the employees performing the work in dispute. Arco and Carpenters have had a collective-bargaining relationship which has been embodied in a series of collective-bargaining agreements, the most recent of which was executed on October 7, 1996, and is currently in effect. Arco has no contractual relationship or collective-bargaining agreement with Iron Workers. Accordingly, this factor favors an award of the work in dispute to employees represented by Carpenters.

2. Employer preference and past practice

We find that Arco prefers to assign the work in dispute to employees represented by Carpenters. As indicated above, on August 8, Arco notified Carpenters that in bidding for Meijer store #165, Arco had assigned the work to employees represented by Carpenters. Fritz Kunz, Arco's estimator project manager, testified that employees represented by Carpenters have always performed this type of work. Kunz, him-

self, was aware of at least 15 Arco projects involving the same contractor as the one involved in this case where Arco used employees represented by Carpenters to perform the disputed work. Arco provided documentation for its assignment of the disputed work to employees represented by Carpenters on many of its bids from June 1, 1994, until the current bid.⁴ We find that this factor favors an award of the disputed work to employees represented by Carpenters.

3. Area and industry practice

Kunz testified that, in his experience, the disputed work had always been performed by employees represented by Carpenters. Paul Hernandez, an official of the North West District Council of Carpenters, testified that the disputed work was conventionally awarded to carpenters by most general contractors or subcontractors. Arco provided documentation showing that other employers assigned the disputed work to employees represented by Carpenters.⁵ We find that this factor favors an award of the disputed work to employees represented by Carpenters.

4. Relative skills and safety

Hernandez testified that the Carpenters' 4-year apprenticeship program specifically includes training in the disputed work. Apprentices "would build the forms, set up the grade and elevations . . . [m]ake sure that it's plumb and level." Hernandez also testified that Iron Workers have no comparable training. We find that this factor favors an award of the disputed work to employees represented by Carpenters.

5. Economy and efficiency of operations

Kunz testified that employees represented by Carpenters would be able to do the disputed work in 3 days. He testified that Mike Sumners, an Ironworkers representative, told him that it would take 30 days to do the disputed work. Hernandez testified that it was far more efficient to have employees represented by Carpenters perform the disputed work, rather than divide the work among separate crafts and employees represented by several unions. We find that this factor favors an award of the disputed work to employees represented by Carpenters.

² Arco and Carpenters stipulated that there is no agreed-upon or approved method for a voluntary adjustment of the dispute to which all parties are bound. There is no evidence in the record of such an agreement.

³ The record reveals that the disputed work was completed by employees represented by the Carpenters. It is well established that the mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur. See, e.g., *Operating Engineers Local 150 (Martin Cement)*, 284 NLRB 858, 860 fn. 4 (1987). There is no indication here that similar disputes will not occur in the future.

⁴ These documents show bids on June 1, 1994; March 15, 1995; April 24, 1995; April 16, 1996; February 17, 1997; and April 28, 1997. They included the performance of the disputed work by employees represented by Carpenters on Meijer stores in Indiana, Ohio, and Kentucky.

⁵ These documents show bids from Power and Sons Construction Company, Inc., Indiana, in June 1996; and Weber Company, Inc., Ohio, and Pennsylvania, in May 1988.

Conclusion

After considering all the relevant factors, we conclude that employees represented by the Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, relative skills and safety, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Carpenters, not to that Union or its members. The determination is limited to the project known as the Meijer's store #165 jobsite located at 611 West U.S. 30, Merrillville, Indiana.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Arco, Inc. represented by Northwest Indiana District Council of the United Brotherhood of Carpenters and Joiners of America are entitled to perform the erection and installation of metal bumper posts or goal posts at Meijer store #165 jobsite located at 611 West U.S. 30, Merrillville, Indiana.

2. International Association of Bridge, Structural and Ornamental Iron Workers, Local 395 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Arco, Inc., to assign the disputed work to employees represented by it.

3. Within 10 days from this date, International Association of Bridge, Structural and Ornamental Iron Workers, Local 395 shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.